



STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

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DECISION OF THE BOARD

Mailed and Filed: JUNE 06, 2023

IN THE MATTER OF:

Appeal Board No. 628506 A

PRESENT: MARILYN P. O'MARA, MEMBER

The Appeal Board, on its motion pursuant to Labor Law § 534, has reopened and reconsidered Appeal Board No. 626070, filed February 8, 2023, which reversed the decision of the Administrative Law Judge and sustained the initial determination disqualifying the claimant from receiving benefits, effective October 2, 2021, on the basis that the claimant voluntarily separated from employment without good cause; and ruled that the alternate initial determination disqualifying the claimant from receiving benefits on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the wages paid to the claimant by THE CITY SCHOOL DISTRICT prior to October 2, 2021 cannot be used toward the establishment of a claim for benefits was academic.

Upon consideration of the entire record, the Board makes the following

FINDINGS OF FACT: The claimant was employed as an elementary school teacher by the employer, the New York City Department of Education (NYC DOE), from 2003 through October 1, 2021.

In August 2021, the NYC Commissioner of Health and Mental Hygiene announced a mandate which required NYC employees to either be vaccinated or undergo weekly testing for COVID19 virus. The claimant tested weekly and reported her results to the employer until that option was eliminated.

The claimant considers herself a Christian. She is not a member of any denomination. She had received vaccinations as an adult until she discovered

the ingredients. She applied for a religious exemption. On September 19, 2021, the employer denied the claimant's request. She appealed the denial by the employer to the City of New York Reasonable Accommodation Appeals Panel.

On or about September 23, 2021, an arbitrator held that the claimant could not be granted an exemption because it would be a hardship for the employer to allow the claimant to work remotely.

On September 28, 2021, the NYC Commissioner of Health and Mental Hygiene issued an order that all people entering DOE buildings had to have at least one dose of a COVID vaccine as of October 4, 2021. The order did not allow unvaccinated individuals to be on-site. Failing to follow the order could have resulted in a loss of funding for the DOE. The claimant was aware of the order and refused to become vaccinated.

On October 4, 2021, the employer placed the claimant on an unpaid leave as she was not vaccinated.

On March 7, 2022, the City of New York Reasonable Accommodation Appeals Panel upheld the denial of the claimant's religious accommodation request because "DOE has demonstrated that it would be an undue hardship to grant this accommodation ... given the need for a safe environment for in-person learning." Very few employees were granted a religious exemption. Had she not been on site, someone else would have to be hired to be present in her classroom.

OPINION: We have reopened and reconsidered our prior decision because we erroneously found that the claimant's objections were personal and philosophical in nature, as she was not part of a recognized and established religious organization.

The credible evidence establishes the claimant was separated from her employment in

October 2021, when she chose to leave her job rather than comply with the employer's COVID-19 vaccination requirement. This constitutes a voluntary separation from employment for unemployment insurance purposes.

The employer's requirement for the claimant to be vaccinated was pursuant to a New York City Commissioner of Health and Mental Hygiene mandate that all

Department of Education (DOE) staff who work in the New York City schools be vaccinated against the COVID-19 virus. This requirement, in place to protect the health and safety of DOE staff, students, and others, was not only reasonable but necessary pursuant to the terms of the vaccine mandate in place during the pandemic.

The Courts have long held that New York State has the authority to regulate public health, including mandating vaccination, to curb the spread of disease. (See *Matter of Garcia v. New York City Dept. of Health & Mental Hygiene*, 31 NY3d 601 [2018], which upheld mandated annual influenza vaccinations for children attending childcare programs in New York City; *Matter of C.F. v. New York City Dept of Health & Mental Hygiene*, 191 AD3d 52 [2d Dept 2020], holding that a municipal agency had the authority to require immunizations of adults in an area where there was an outbreak of measles if authorized by law; and *Matter of New York City Mun. Labor Comm. v. City of New York*, 73 Misc3d 621 [Sup. Ct. N.Y. Cnty. 2021], where the Court declined to grant a temporary restraining order of the implementation of the New York City Department of Education's COVID-19 vaccine mandate for its employees, noting that there was no dispute that the Department of Health and Mental Hygiene had the authority to issue the mandate and that the Court "...cannot and will not substitute [others'] judgment for that of New York City's public health experts," citing *New York*

State Inspection, Sec. & Law Enforcement Empls., Dist. Council 82 v. Cuomo, 64 NY2d 233, 237-40 [1984]).

The claimant's contention that she had good cause to leave her job rather than comply with the mandate because her religious beliefs did not allow her to be vaccinated, is unavailing under these circumstances. The Supreme Court of the United States has held that, "... an individual's religious beliefs [do not] excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate" (see *Employment Div. v. Smith*, 494 US 872, 879 [1990]). The Court determined that, provided a law is neutral and not aimed at a specific religion, is generally applicable and pertains to an area of law the government has the ability to regulate, it cannot be preempted by a religious practice. The Second Circuit of the United States Court of Appeals found that the vaccination mandate at issue here is neutral, is generally applicable, and was a reasonable exercise of the State's power to protect the public health. (*Kane v. De Blasio*, 19 F. 4th 152, 2021 U.S. App. LEXIS 35102 (2d Cir. 2021)). Thus, the claimant's religious beliefs do not take precedence

over the mandate. Finally, and significantly, the United States Supreme Court has denied requests to block the vaccination mandate for New York City teachers. (See *Keil v. City of New York*, 2022 U.S. LEXIS 1379, March 7, 2022;. *Maniscalco v. Bd. of Educ. of the City Sch. Dist. of N.Y. City*, 2022 NYLJ LEXIS 399, April 18, 2022).

We are not persuaded by the claimant's contention that she should have been provided a reasonable accommodation such as teaching remotely. The claimant admitted that very few exemptions were granted and the DOE provided credible testimony that allowing remote work would create an undue hardship because someone else would have to be hired to be present in her classroom. We note that the Court has denied petitions for religious exemptions and reasonable accommodations where it would create an undue hardship (See, e.g., *Matter of Lebowitz v. Board of Education*, 2022 N.Y. Misc LEXIS 10316).

The claimant could have preserved her employment by complying with the employer's requirement to become vaccinated (See Appeal Board Nos. 624830 and 621758). A claimant who fails to take a step that is reasonably required for continued employment is deemed to have voluntarily separated from employment without good cause (See *Matter of Wackford*, 284 AD2d 770 [3d Dept 2001]). Accordingly, we conclude that the claimant was separated from her employment under disqualifying circumstances.

In light of our ruling that the claimant voluntarily separated from her employment without good cause, the question of whether she lost her employment through misconduct, is rendered academic.

DECISION: The decision of the Appeal Board is rescinded.

The decision of the Administrative Law Judge, insofar as appealed from, is reversed.

The initial determination, disqualifying the claimant from receiving benefits, effective October 2, 2021, on the basis that the claimant voluntarily separated from employment without good cause, is sustained.

The claimant is denied benefits with respect to the issues decided herein.

MARILYN P. O'MARA, MEMBER